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No. 865.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

LEVITT AND SONS, INCORPORATED,
Appellant,

vs.

DIVISION AGAINST DISCRIMINATION IN THE STATE DEPARTMENT OF EDUCATION, WILLIE R. JAMES and FRANKLIN D. TODD,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY.

MOTION OF APPELLEES WILLIE R. JAMES AND FRANKLIN D. TODD TO DISMISS.

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TABLE OF CONTENTS.

	PAGE
STATUTE INVOLVED	2
QUESTIONS PRESENTED	2
STATEMENT	3
ARGUMENT:	
Point I. Appellant has not properly raised its claim of "indefiniteness" for review by this Court	5
Point II. The Law Against Discrimination does not violate Article VI, Clause 2 of the United States Constitution	10
Point III. The Law Against Discrimination is not void for indefiniteness	16
CONCLUSION	21

CASES CITED.

Alabama v. *King & Boozer*, 314 U. S. 1 (1941)	12
Allen-Bradley Local v. *Wisconsin Employment Relations Board*, 315 U. S. 740 (1942)	12
American Power & Light Co. v. *Securities and Exchange Commission*, 329 U. S. 90 (1946)	17, 18
Bandini Petroleum Co. v. *Superior Court*, 284 U. S. 8 (1931)	4
Board of Supervisors of La. St. U. & A. & M. Col. v. *Ludley*, 252 F. 2d 372 (5th Cir. 1958), cert. denied, 358 U. S. 819 (1958)	19, 20

PAGE

Bob-Lo Excursion Co. v. *Michigan*, 333 U. S. 28 (1948) 13, 14
Boyce Motor Lines v. *United States*, 342 U. S. 337 (1952) 17, 18
Burstyn v. *Wilson*, 343 U. S. 495 (1952) 19, 20
Cline v. *Frink Dairy Co.*, 274 U. S. 445 (1927) 19
Congress of Industrial Organizations v. *McAdory*, 325 U. S. 472 (1945) 5
Corkran Oil Company v. *Arnaudet*, 199 U. S. 182 (1905) 6
Dorsey v. *Stuyvesant Town Corp.*, 299 N. Y. 512 (1949), cert. den. 339 U. S. 981 (1950) 12
Esso Standard Oil Co. v. *Evans*, 345 U. S. 495 (1953) 12
Godschaux Co. v. *Estopinal*, 251 U. S. 179 (1919) .. 6, 10
Gulf Refining Co. v. *United States*, 269 U. S. 125 (1925) 4
Hendrick v. *Maryland*, 235 U. S. 610 (1915) 12
Herndon v. *Georgia*, 295 U. S. 441 (1935) 9, 10
Huron Portland Cement Co. v. *Detroit*, decided April 25, 1960, 28 U. S. L. W. 4269 ..... 10, 12, 13
James v. *Bravo Contracting Co.*, 302 U. S. 134 (1937) 12
James Stewart & Co. v. *Sadrakula*, 309 U. S. 94 (1940) 12
Madruga v. *Superior Court*, 346 U. S. 556 (1954) ... 4
Mahler v. *Eby*, 264 U. S. 32 (1924) 17
Miller v. *Arkansas*, 352 U. S. 187 (1956) 13
O'Meara v. *Washington State Board* (unreported), Super. Ct. Wash. 1959 5
Orleans Parish School Board v. *Bush*, 242 F. 2d 156 (5th Cir., 1957), cert. den., 354 U. S. 921 (1957) .. 19, 20
Penn Dairies v. *Milk Control Commission*, 318 U. S. 261 (1943) 12

	PAGE
Public Utilities Commission v. *United States*, 355 U. S. 534 (1958)	13
Railway Mail Association v. *Corsi*, 326 U. S. 88 (1945)	13
Rescue Army v. *Municipal Court*, 331 U. S. 549 (1947)	4
Richfield Oil Corp. v. *State Board of Equalization*, 329 U. S. 69 (1946)	4
Shuttlesworth v. *Birmingham Board of Education*, 162 F. Supp. 372 (1958), aff'd, 358 U. S. 101 (1958)	20
Small Co. v. *Am. Sugar Ref. Co.*, 267 U. S. 233 (1925)	19
Smith v. *Davis*, 323 U. S. 111 (1944)	12
United States v. *Harriss*, 347 U. S. 612 (1954)	17
United States v. *Petrillo*, 332 U. S. 1 (1947)	18, 19
Winters v. *New York*, 333 U. S. 507 (1948)	20

UNITED STATES CONSTITUTION CITED.

Art. VI, Clause 2	2, 10
Fifth Amendment	16
Fourteenth Amendment	2

NEW JERSEY CONSTITUTION CITED.

Art. I, Par. 5	18

UNITED STATES STATUTES CITED.

28 U. S. C. Sec. 1257	4
28 U. S. C. Sec. 1257(2)	5
28 U. S. C. Sec. 1257(3)	5
28 U. S. C. Sec. 2103	5
42 U. S. C. Sec. 1441	14
42 U. S. C. Sec. 1982	14

New Jersey Statutes Cited.

PAGE

"Law Against Discrimination" (R. S. 18:25-1 et seq.):

R. S. 18:25-1 et seq. 2, 11
R. S. 18:25-2 18
R. S. 18:25-3 18
R. S. 18:25-4 ..... 3, 6, 7, 14, 16, 18
R. S. 18:25-5k 6, 8, 16, 17, 18, 19
R. S. 18:25-19 17

Statutes and Local Ordinances of Other States Cited.

California—Health and Safety Code Cal., Secs. 33049, 35700 through 35740 11

Colorado—House Bill No. 259, Approved April 10, 1959 11

Connecticut—Gen. Stats. Conn., Secs. 53-35, 53-36, and 31-122 through 31-128 11

Massachusetts—Anno. L. Mass., Supp., Ch. 151 B, Secs. 1 through 10 11

Minnesota—Minn. Stats. Ann., Secs. 462.481, 462.525 and 462.641 11

New York—Executive Law (McKinney), Secs. 290 through 301 11

Oregon—Ore. Rev. Stat., Secs. 659.010 through 659.110 11

Pittsburgh, Pa.—Ordinance approved December 15, 1958, Supplementing Ordinance No. 237, approved June 25, 1955 11

Washington—Rev. Code Wash., Sects. 49.60.010 through 49.60.310 as amended L. 1957, ch. 37 11

OTHER AUTHORITIES CITED:

	PAGE
Comment, 59 Col. L. Rev. 782 (1959)	11
84 Cong. Rec. 1432 (1939)	15
93 Cong. Rec. 11401-11402 (1947)	15
95 Cong. Rec. 12079 (1949)	15
FHA Rules and Regulations, Mutual Mortgage Insurance, Secs. 221.29, 221.34	15
FHA Underwriting Manual (1949), Sec. 242	15
Hearings on Civil Rights, House Judiciary Subcommittee No. 5, 86th Cong., 1st Sess. (1959), pp. 422-423 (Statement of FHA Commissioner, Norman P. Mason)	15
Housing and Home Finance Agency, "Nondiscrimination Statutes, Ordinances, and Resolutions Relating to Public and Private Housing and Urban Renewal Operations," revised October, 1958	11
The New Jersey Housing Anti-Bias Law, 12 Rutgers L. Rev. 557 (1958)	14
Report of the United States Commission on Civil Rights (1959), pp. 465-467	15
Senate Report No. 1300, 75th Cong., 2d Sess. (1937), p. 20	15
Senate Report No. 1472, 83rd Cong., 2d Sess. (1954), p. 2	15

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Appellees.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY.

MOTION OF APPELLEES JAMES AND TODD TO DISMISS.

The individual appellees in the above entitled case, Willie R. James and Franklin D. Todd, move to dismiss the appeal on the grounds that the questions presented do not raise a substantial federal question, and that the second of the two questions presented was not timely or properly raised or expressly passed on in the court below.

Statute Involved.

The New Jersey statute upheld by the Supreme Court of New Jersey is the "Law Against Discrimination" (New Jersey Revised Statutes 18:25-1 *et seq.*), the relevant portions of which are set forth at pages 3 to 4 of the Jurisdictional Statement.

Questions Presented.

1. Does the New Jersey Law Against Discrimination, as applied to appellant because of its participation in the federal program of mortgage insurance, violate Article VI, Clause 2 of the United States Constitution by placing local restrictions upon a national program adopted by Congress, by conflicting with Congressional policy or by imposing requirements on a Federal agency subject to federal constitutional standards?

2. Is the provision in the New Jersey Law Against Discrimination prohibiting discrimination by the owner of a "publicly assisted housing accommodation" so lacking in standards by which the identity of the persons subject to the provisions of that statute can be determined as to violate the Due Process Clause of the Fourteenth Amendment?

Statement.[1]

Appellant announced in June, 1958, that its new 16,000-home project in Levittown Township (formerly known as Willingboro Township) New Jersey, would be an all-white community. Appellant thereafter denied the individual appellees, Willie R. James and Franklin D. Todd, who are Negroes, opportunity to buy homes in the project because of their race. They thereupon filed charges of discrimination by appellant with the Division Against Discrimination of the New Jersey Department of Education, which administers the State "Law Against Discrimination". Section 4 of that law, *inter alia*, prohibits discrimination based on race, creed, color, or national origin in housing receiving public assistance.

While the Division was investigating these complaints, appellant initiated this suit to enjoin proceedings by the Division under the statute. Appellant claimed that its housing project did not fall within the terms of the statute, that the law contained no effective enforcement provisions, and that, if the law was applicable to appellant, it was unconstitutional. These claims were rejected by the Appellate Division of the Superior Court and by the Supreme Court of New Jersey. (The history of the litigation is set forth in detail at pages 7 to 10 of the Jurisdictional Statement.) The principal points urged by appellant in the lower courts were matters of statutory interpretation and jurisdiction which appellant admittedly cannot and has not raised in this Court.

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[1] References to pages of the Appendix attached to the Jurisdictional Statement will be indicated by "(App. ....a)."

The individual appellees submit that neither of the two constitutional questions presented by appellant in its Jurisdictional Statement (page 5) is substantial and that, in addition, appellant failed to present properly to the court below the second of the two questions on which it here relies.[2]

[2] We do not suggest that this appeal should be dismissed because the order of the court below is not final, within the meaning of 28 U. S. C. § 1257, even though the court held that "the relief sought by plaintiffs [including appellant] in their action in lieu of prerogative writs cannot be granted, and the cause must be returned to the Division Against Discrimination in the State Department of Education for disposition" (App. 21a). We believe the order is final.

In the first place, the order is unquestionably final as to the proceeding instituted by appellant to restrain the Division. The court below having held that that relief "cannot be granted," nothing remains to be done in that proceeding. See *Madruga* v. *Superior Court*, 346 U. S. 556, 557, n. 1 (1954); *Bandini Petroleum Co.* v. *Superior Court*, 284 U. S. 8, 14 (1931); *Rescue Army* v. *Municipal Court*, 331 U. S. 549, 566 (1947).

In the second place, the need for further proceedings before the Division has been obviated by a stipulation entered into by all the parties while the case was before the court below. The terms of the stipulation, which is on file with the Division Against Discrimination, are set forth in the *Appendix* to this Motion. That stipulation provides that, upon a finding by the court below that the Law applies to appellant, and upon issuance of that court's mandate (which has not yet occurred), the Division shall issue an order against appellant in the precise terms set forth in the stipulation, which order shall be enforceable in the state courts without notice to appellant. This consent order leaves nothing but ministerial action for the Division and the courts. The purpose of the stipulation, of course, was to permit the litigation to end when appellant's challenge to the statute was disposed of. Under these circumstances, the decision of the Court below is final. See *Richfield Oil Corp.* v. *State Board of Equalization*, 329 U. S. 69, 73 (1946); *Gulf Refining Co.* v. *United States*, 269 U. S. 125, 136 (1925).

ARGUMENT.

POINT I.

Appellant has not properly raised its claim of "indefiniteness" for review by this Court.

Appellant asserts jurisdiction in this Court under 28 U. S. C. Sec. 1257(2), which permits an appeal from a state court which has sustained the validity of a state statute where the validity of the statute has been "drawn in question" on the ground of repugnance to the United States Constitution.[3] This Court is "without jurisdiction" to consider such questions unless they are properly presented to the lower court: *Congress of Industrial Organization* v. *McAdory*, 325 U. S. 472, 477 (1945) and cases there cited. We submit that the second of appellant's two questions, con-

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[3] Appellant asks in the alternative for review of the decision below by writ of certiorari under 28 U. S. C. Secs. 1257(3) and 2103 (Jurisdictional Statement, p. 3). Apparently in support of this prayer, it suggests that there is a conflict in lower court decisions on the questions here presented (Jurisdictional Statement, p. 25). In fact, however, none of the cited cases dealt with the two narrow issues here raised—federal supremacy and vagueness. Thus, the decision in *O'Meara* v. *Washington State Board* (unreported), which appellant has included in its appendix (App. 48a to 62a), invalidated the Washington statute against discrimination in publicly assisted housing on two grounds, deprivation of property without due process and unreasonable classification. Neither of these grounds is presented here.

It should also be noted that the constitutional question regarding indefiniteness is not one that can be expected to arise under other state anti-discrimination laws. It arises in this case only because of the wording of the New Jersey statute. (See Jurisdictional Statement, p. 19.) We submit that for these reasons, as well as the arguments given above in support of the motion to dismiss the appeal, this Court should not grant a writ of certiorari herein.

cerning the alleged indefiniteness of the statute, was not properly presented below and is therefore not before this Court.

1. Appellant did not raise this question in the court below until it filed its petition for rehearing and it was not passed on by that court (see Jurisdictional Statement, pp. 10-11). Appellant recognizes that, since the court below did not entertain the petition for rehearing and pass upon the point, it cannot urge this point here,[4] unless it can be treated as a "surprise" issue. Accordingly, it claims that the question of indefiniteness entered the case only because of an interpretation of the statute in question by the court below which "Levitt could not reasonably have anticipated" (Jurisdictional Statement, p. 10). That is plainly not so.

The interpretation that appellant now describes as unexpected and unanticipated is that Section 4 of the New Jersey Law Against Discrimination bars discrimination in any housing that comes within the natural meaning of the term, "publicly assisted housing accommodation," as used in that Section, as that meaning is illustrated by the non-exclusive example given in Section 5k (App. 10a-12a). As we shall show, the broad interpretation of Section 4 was urged in the intermediate appellate court (the Appellate Division of the Superior Court), and was adopted by it. In the state Supreme Court, both the Division Against Discrimination and the individual appellees urged the broad interpretation in clear terms. Appellant clearly understood that argument and opposed it on various non-

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[4] *Corkran Oil Company* v. *Arnaudet*, 199 U. S. 182, 193 (1905); *Godschaux Co.* v. *Estopinal*, 251 U. S. 179, 181, 182 (1919) and cases cited therein.

constitutional grounds. Thus, it had ample warning that the court below might rule as it did.

2. When this case was in the Appellate Division, the appellees expressly urged, as that court noted in its opinion: "That in any event, the statute covers all 'publicly assisted housing,' and therefore includes any housing which has received material assistance in any way by operations or services of FHA" (App. 32a). The Appellate Division sustained this argument, saying (App. 32a-33a):

> "We hold that plaintiffs' contention that the housing in question is not 'publicly assisted housing accommodations' within the meaning of N. J. S. A. 18:25-4 is without merit. To hold otherwise would require us to ignore the large scale operation of FHA in connection with plaintiffs' developments, the details of which have been above outlined."

3. When the Appellate Division's decision was appealed to the court below, the parties continued to urge the broad interpretation of Section 4. The first reference to Section 4 in the argument portion of the brief filed by the Attorney General on behalf of the Division in the state Supreme Court described Section 4 as establishing "the right to obtain '*all* the accommodations, advantages, facilities and privileges of *any* • • • publicly assisted housing accommodation'" (Division brief, p. 14) (emphasis supplied in original brief). The brief of the Attorney General then devoted *six* pages to an argument under the heading: "The New Jersey Law covers all housing which is publicly assisted" (p. 16). After reviewing the evidence, it argued that "the assistance rendered directly by FHA to the developments here involved brought them clearly within the

literal and the common sense orbit of the term 'publicly assisted' as used in the Law Against Discrimination" (p. 20). The further argument was then made that the Legislature used the term of art, "include," in Section 5k in order to keep Section 5k from being restrictive (p. 21). This portion of the Attorney General's brief concluded:

> "The public assistance rendered directly to the builders during every stage of developing the houses is clearly encompassed within the Law Against Discrimination" (p. 22).

Similarly, the relevant portions of the argument in the Joint Brief For All Individual Defendants-Respondents (appellees here) started with the statement:

> "Section 4 of the Law Against Discrimination, as amended in 1957, establishes a civil right not to be discriminated against in a 'publicly assisted housing accommodation.' This, we contend, means that a housing accommodation is covered by the Act if it is shown to be publicly assisted" (p. 21).

In this same brief (p. 23) appellees urged that:

> "The use of the word 'include' in section 5k necessarily implies that the term being defined, 'a publicly assisted housing accommodation,' is *not limited* to the particular examples which are specified. It was so held in the case of State *v.* Rosecliff Realty Co. * * *. So here, the general term 'publicly assisted housing accommodation' must be 'construed fairly and justly' (R. S. Cum. Supp. 18:25-27), so as to include within its application all housing which may reasonably be held to have received substantial public assistance in any form." (Emphasis supplied in original brief.)

Later in this same brief (p. 51), in the discussion of appellant's contention (not raised in this Court) that the statute arbitrarily included some types of publicly assisted housing but excluded others, one of the answering arguments was:

> "Indeed, as we have demonstrated under Points I to IV, inclusive, of this brief, both the 1957 Amendment to the Law Against Discrimination as well as the enforcement provisions of section 9.1 cover all publicly assisted housing, and the enumeration of statutes in section 5k is not all-inclusive."

Appellant clearly understood the nature of these arguments. Thus, in its main brief filed in the court below, it referred to the Division's assumption "that the legislative intent was to include all housing as to which there was any public assistance" (pp. 23-24). It described the Division as arguing that " 'publicly assisted housing accommodation' is not in any way limited to the definition in N. J. S. A. 18:25-5(k)" (p. 24), and then continued to argue that the Legislature did not intend such broad coverage (pp. 24-25).

Plainly, appellant had ample opportunity at that point to urge that, if this interpretation were accepted, it would make the statute unconstitutional. Instead, it confined itself to arguments concerning statutory construction and legislative intent.

4. On this record, appellant cannot claim that the decision of the court below introduced a new and unexpected constitutional issue. This Court has declared that the test, in considering a claimed "surprise" issue, is "whether the ruling • • • assailed should have been anticipated." *Hern-*

don v. *Georgia*, 295 U. S. 441, 444 (1935). This Court held in that case that a litigant is bound to anticipate statutory interpretations suggested by prior rulings of the state court in other cases. In the case at bar, the ruling claimed as a surprise was made by a lower court *in the same case* and was explicitly urged by the parties in the court below.[5]

We respectfully submit, therefore, that this Court is without jurisdiction to consider the second question set forth by appellant in its Jurisdictional Statement.

POINT II.

The Law Against Discrimination does not violate Article VI, Clause 2 of the United States Constitution.

Appellant's argument that the New Jersey Law Against Discrimination violates the Supremacy Clause is refuted by those decisions of this Court "which enjoin seeking out conflicts between state and federal regulation where none clearly exists." *Huron Portland Cement Co.* v. *Detroit*, decided April 25, 1960, 28 U. S. L. W. 4269, 4271.

1. This part of appellant's argument rests on an obviously unsound and mistaken factual assumption—that "Congressional failure to adopt anti-discrimination provisions in enacting the various FHA laws indicates a *Congressional policy not to have such limitations imposed*" (Jurisdictional Statement, p. 13) (emphasis supplied).

Undoubtedly, Congress has made a conscious decision not to apply a non-discrimination clause to federally-

[5] Even if the Appellate Division had not ruled on this issue, appellant would still have been on notice that it was in the case. *Godschaux Co.* v. *Estopinal*, *supra*.

assisted housing that would operate in all the states of the Union. In view of the "mixed motives" that prompted this decision (Comment, 59 Colum. L. Rev. 782, 784, n. 19 (1959)), it cannot possibly be distorted into a policy of *forbidding* application to FHA housing of the non-discrimination laws of individual states.

If this argument were sustained, all of the various state and local laws barring discrimination in housing generally or in housing receiving public assistance would be invalidated, at least in part.[6] Nor would this stop with housing. Presumably, under appellant's logic, state fair employment laws may not constitutionally apply to Federal contractors. State laws against discrimination in colleges and universities may not apply to institutions receiving federal grants.

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[6] (a) *State laws barring discrimination in general housing:* Colorado—House Bill No. 259, Approved April 10, 1959; Connecticut—Gen. Stats. Conn., Secs. 53-35, 53-36, and 31-122 through 31-128; Massachusetts—Anno. L. Mass., Supp., Ch. 151 B, Secs. 1 through 10; Oregon—Ore. Rev. Stat., Secs. 659.010 through 659.110.

(b) *State laws barring discrimination in publicly assisted housing:* California—Health and Safety Code Cal., Secs. 33049 and 35700 through 35740; Minnesota—Minn. Stats. Ann., Secs. 462.481, 462.525, and 462.641; New Jersey—N. J. Revised Statutes, 18:25-1 through 18:25-28; New York—Executive Law (McKinney), Secs. 290 through 301; Washington—Rev. Code Wash., Secs. 49.60.010 through 49.60.310, as amended L. 1957, Ch. 37.

(c) *Local ordinances and resolutions:* These are collected in the federal Housing and Home Finance Agency's 60-page report: "Nondiscrimination Statutes, Ordinances, and Resolutions Relating to Public and Private Housing and Urban Renewal Operations," revised October 1958. See especially the broad New York City ordinance set forth at pages 44-46 of the study. Since then Pittsburgh, Pa. has adopted a similar ordinance. Ordinance approved December 15, 1958, supplementing Ordinance No. 237, approved June 25, 1955.

Could anyone argue that the Housing Act would have been adopted if it had contained a clause expressly invalidating state anti-discrimination laws? Yet that is what appellant contends that Congress, in fact, did.[7]

2. "Evenhanded local regulation to effectuate a legitimate local public interest," such as this Court has just sustained (*Huron* case *supra*, 28 U. S. L. W. at 4270), is all that is involved here. This Court "has long insisted that an 'intention of Congress to exclude states from exerting their police power must be clearly manifested.'" *Allen-Bradley Local* v. *Wisconsin Employment Relations Board*, 315 U. S. 740, 749 (1942), citing many cases. We submit that the regulation here involved is clearly sustainable under the guidelines established by numerous decisions of this Court.[8]

The cases cited by appellant at pp. 15-16 of the Jurisdictional Statement provide no authority for its extreme claims. Each of them struck down state laws which impaired the functioning of a federal program. Thus, the

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[7] Appellant's reliance (Jurisdictional Statement pp. 13-14) on *Dorsey* v. *Stuyvesant Town Corp.*, 299 N. Y. 512 (1949), cert. den. 339 U. S. 981 (1950) is entirely misplaced. That case held that the New York legislature had not barred discrimination, not that it could not. Far from guaranteeing those who built under the statute a right to discriminate, the court specifically said that "political processes [i.e., appeals to the legislature] must furnish the appropriate means for extension of those rights in areas wherein they have not been heretofore asserted" (299 N. Y. at 534).

[8] See for example: *Alabama* v. *King & Boozer*, 314 U. S. 1 (1941); *Penn Dairies* v. *Milk Control Commission*, 318 U. S. 261 (1943); *James Stewart & Co.* v. *Sadrakula*, 309 U. S. 94 (1940); *Hendrick* v. *Maryland*, 235 U. S. 610 (1915); *Esso Standard Oil Co.* v. *Evans*, 345 U. S. 495 (1953); *Smith* v. *Davis*, 323 U. S. 111 (1944); *James* v. *Dravo Contracting Co.*, 302 U. S. 134 (1937).

state statute condemned in *Miller* v. *Arkansas*, 352 U. S. 187 (1956), was found by this Court to "frustrate the expressed federal policy of selecting the lowest responsible bidder" (352 U. S. at 190). In *Public Utilities Commission* v. *United States*, 355 U. S. 534, 540 (1958), "a comprehensive policy governing procurement" was found to be jeopardized by the state law.

3. Two decisions of this Court show that it is extremely difficult to twist a state ban of racial discrimination into an impediment to federal policy. In *Railway Mail Association* v. *Corsi*, 326 U. S. 88 (1945), this Court upheld application of a New York statute barring racial discrimination by labor unions to an organization of post office employees. The statute was found valid even though it "inevitably imposes some burdens on those dealing with the national government of the same kinds as those imposed on others" (326 U. S. at 95). The union, the Court concluded, had failed to show "an intent on the part of Congress to enter and completely absorb the field of regulation of organizations of federal employees." *Id.* at 97. In *Bob-Lo Excursion Co.* v. *Michigan*, 333 U. S. 28 (1948), which was cited with approval in the *Huron* case, *supra* (28 U. S. L. W. at 4271), this Court rejected a claim that the Michigan law prohibiting discrimination by public carriers could not apply to a ship traveling in foreign commerce. This Court said (333 U. S. at 37): "The regulation in this application contains nothing out of harmony, much less inconsistent with our federal policy . . ." It added (333 U. S. at 40): "It is difficult to imagine what national interest or policy . . . could reasonably be found to be adversely affected by applying Michigan's statute to these facts or to outweigh her interest in doing so."

4. Appellant's argument that the Law Against Discrimination places restraints on the FHA rests on its asserted premise that "the statute has the effect of prohibiting FHA from insuring mortgage loans in New Jersey on housing unless sold in compliance with the New Jersey statute" (Jurisdictional Statement, p. 16). But the Law Against Discrimination does not regulate the FHA but the builders who use the FHA facilities. It does not impinge upon FHA operations any more than do the building codes and safety laws that govern the operations of all builders. These regulations, although they vary from state to state and even from locality to locality, have not introduced any insuperable difficulties in the administration of the FHA program. The cases cited above (in the preceding paragraph and in footnote 8) clearly establish the validity of the application of such laws to FHA housing.

5. Far from plainly infringing upon Federal policy as required by the cases already cited, Section 4 of the Law Against Discrimination in fact materially promotes the very purposes for which the FHA was established. See Note, *The New Jersey Housing Anti-Bias Law*, 12 Rutgers L. Rev. 557, 570-573 (1958).[9] The "national housing policy" declared by Congress is aimed at "the realization as soon as feasible of the goal of a decent home and a suitable living environment for every American family * * *" 42 U. S. C. Sec. 1441. This in turn implements 42 U. S. C. Sec. 1982 which guarantees to all citizens the same right to purchase and hold property as is enjoyed by white citizens.

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[9] Similar support of Federal anti-discrimination policy was noted by this Court in the *Bob-Lo* case, *supra*, 333 U. S. at 37, n. 16.

Congressional intent in enacting the Federal housing program was from its beginning primarily to expand housing facilities for the use of veterans, defense workers and persons of low income and moderate means.[10] Plainly this means *all* veterans, defense workers and persons of low income.

It is clear that FHA does not find itself burdened by state laws against discrimination. It recognizes those laws as valid and as aiding fulfillment of the purposes embodied in the national housing program. FHA has encouraged the sale and rental of homes without discrimination.[11] With specific regard to state anti-discrimination laws, it is the policy of FHA to enter into cooperation agreements with state anti-discrimination agencies to further adherence to the laws they administer.[12] This policy is embodied in FHA forms 2004 (Exh. B, J118a)[13] and 2201-G (Exh. B, J120a), which call attention to the provisions of the Law Against Discrimination and warn that "you are expected to conduct your operations in conformity with the above laws."

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[10] See S. Rept. No. 1300, 75th Congress, 2d Sess. (1937), p. 20; 84 Cong. Rec. 1432 (1939); 93 Cong. Rec. 11401-11402 (1947); 95 Cong. Rec. 12079 (1949); S. Rept. No. 1472, 83rd Cong., 2d Sess. (1954), p. 2.

[11] See FHA Rules and Regulations, Mutual Mortgage Insurance, Sec. 221.29, Sec. 221.34; FHA Underwriting Manual (1949), Sec. 242; Statement of FHA Commissioner Norman P. Mason (now Housing and Home Financing Administrator) at hearing on "Civil Rights" before Sub-committee 5 of the House Judiciary Committee, March 13, 1959, 86th Cong., 1st Sess., pp 422-423.

[12] Statement of Mr. Mason cited in footnote 11, at p. 423; Report of the United States Commission on Civil Rights, pp. 465-467 (1959).

[13] These references are to the Joint Appendix for All Parties in the court below.

6. Finally, appellant argues that the Fifth Amendment imposes a requirement of non-discrimination on FHA and requires it, "in providing federal assistance to private builders, to impose a duty not to discriminate on a national basis" (Jurisdictional Statement, p. 17). This argument, of course, is at war with its previous argument (Jurisdictional Statement, p. 13) that Congress intended to allow FHA builders to discriminate. In any case, if the argument is valid, appellant is bound by the Fifth Amendment not to discriminate and is obviously not in a position to object to a New Jersey statute imposing the same obligation.

POINT III.

The Law Against Discrimination is not void for indefiniteness.

The court below found that the Law Against Discrimination applies to housing that falls within the natural meaning of the phrase, used in Section 4, "publicly assisted housing accommodations," as the meaning of that phrase is illuminated by the examples given in Section 5k (App. 9a-12a). Appellant contends that this interpretation of the statute makes it so vague as to render its application to appellant a violation of due process (Jurisdictional Statement, pp. 18-23). Assuming that this claim is properly before this Court (see Point I, *supra*) we submit that it raises no substantial question. The decisions of this Court leave no room for doubt that the phrase, "publicly assisted housing accommodation," is sufficiently precise, even standing by itself, to serve as a basis for administrative action and that this conclusion is reenforced by the illustrations given

in Section 5k and the legislative policy stated in Sections 2 and 3.

1. A statute may be void for vagueness if it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute." *United States* v. *Harriss*, 347 U. S. 612, 617 (1954). This Court has made it plain that "the rule as to a definite standard of action is not so strict" where the challenge is based on "the delegation of legislative power to executive boards and officers." *Mahler* v. *Eby*, 264 U. S. 32, 41 (1924). Accord: *Boyce Motor Lines* v. *United States*, 342 U. S. 337, 340 (1952).

The reason for this is exemplified in the instant case: No builder of housing can be put in peril by any possible vagueness in the clause here challenged by appellant. No builder is subject to compulsion until the Division has determined that its operations are covered by the Act and has issued an order which has been enforced by a court, in a civil action for specific performance, after review of all the legal issues. See N. J. Revised Statutes 18:25-19.

2. The phrase, "publicly assisted housing accommodation," has a simple common sense meaning that provides entirely adequate guides for the administrative agency enforcing the law and for the courts. Indeed, it is far clearer than other phrases that have been sustained against constitutional attack for vagueness.

The applicable cases are summarized in *American Power & Light Co.* v. *Securities and Exchange Commission*, 329 U. S. 90, 104 (1946), where this Court upheld legislative provisions granting the S. E. C. power to act so as "to

ensure that the corporate structure or continued existence of any company in a particular holding company system does not '*unduly or unnecessarily complicate the structure*,' or '*unfairly or inequitably distribute voting power among security holders*' " of such holding-company system. (Emphasis supplied). This Court held (329 U. S. at 105):

> **"These standards are certainly no less definite in nature than those speaking in other contexts in terms of 'public interest,' 'just and reasonable rates,' 'unfair methods of competition' or 'relevant factors.' The approval which this Court has given in the past to those standards thus compels the sanctioning of the ones in issue." (Citing cases.)**

Subsequently this Court stressed that, even in criminal cases, the Constitution "does not require impossible standards" [*United States* v. *Petrillo*, 332 U. S. 1, 7 (1947)], or "the precision of mathematical symbols". *Boyce Motor Lines* v. *United States*, *supra*, 342 U. S. at 340.

In any case, neither the Division nor the reviewing courts need construe the language of Section 4 as it stands alone. They can turn to the legislative purpose and policy, as declared in Sections 2 and 3 of the law (N. J. Revised Statutes 18:25-2 and 3). As the court below noted, they can also "be mindful of the clear and positive policy of our State against discrimination as embodied in *N. J. Const.*, Art. I, par. 5" (App. 8a). Finally, they can and must follow the path of the court below in treating Section 5k as giving "illustrations of the meaning of the phrase being considered" (App. 10a, 12a-13a).

Even a criminal statute can withstand the suggestion of possible "marginal cases." *United States* v. *Petrillo*,

supra, 332 U. S. at 7. Common sense, as well as a reference to Section 5k, will quickly dispose of the "marginal cases" suggested by appellant (Jurisdictional Statement, pp. 19-20). In an administrative statute, as the cases above show, there is ample clarity in a phrase like "publicly assisted housing accommodation," which has a natural factual meaning and appears in a statutory context that provides clear guides for administrative judicial delineation. The reviewing courts, in turn, as the court below noted, need not decide in each case "what are the outer limits of the term" (App. 13a).

3. Appellant cites no authority for its strained due process argument except two cases involving pupil placement laws [*Orleans Parish School Board* v. *Bush*, 242 F. 2d 156 (5th Cir. 1957), cert. denied, 354 U. S. 921 (1957) and *Board of Supervisors of La. St. U. & A. & M. Col.* v. *Ludley*, 252 F. 2d 372 (5th Cir. 1958), cert. denied, 358 U. S. 819 (1958)] and one involving freedom of speech [*Burstyn* v. *Wilson*, 343 U. S. 495 (1952)].[14] These cases are easily distinguished.

It should be noted at the outset that all of these cases dealt with statutes appearing to limit basic democratic rights under the Constitution. Thus, in *Burstyn*, Justice Frankfurter, concurring, took care to point out that the effect of this vague statute was to "fetter the mind and put within unascertainable bounds the varieties of religious

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[14] The only other cases cited in this portion of the Jurisdictional Statement (pp. 18-23) [*Small Co.* v. *Am. Sugar Ref. Co.* 267 U. S. 233 (1925) and *Cline* v. *Frink Dairy Co.*, 274 U. S. 445 (1927)], are referred to by appellant only to support its point that the rule against vagueness applies to civil as well as criminal cases. They provide no authority for applying that rule to the clear terms of the New Jersey statute.

experience" (343 U. S. at 533). In *Winters* v. *New York*, 333 U. S. 507, 517 (1948), this Court stressed that the rule against vagueness is applied more strictly to statutes threatening "limitations on free expression."

Turning to the three cases cited by appellant, we find that in both *Orleans* and *Ludley*, state laws, permitting local school officials to determine or otherwise affect which schools pupils were to attend, provided either the unconstitutional standard of racial segregation or *no* standard at all. Viewed most favorably to appellant, these two cases merely hold that a statute that provides *no* standard for administrative action is invalid.[15]

In *Burstyn*, this Court found the term, "sacrilegious," too indefinite because: "Under such a standard the most careful and tolerant censor would find it virtually impossible to avoid favoring one religion over another, and he would be subject to an inevitable tendency to ban the expression of popular sentiments sacred to a religious minority" (343 U. S. at 505). No parallel threat to freedom of expression exists here. Furthermore, the statutory language here challenged certainly can be fixed in meaning far more readily that the term "sacrilegious."

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[15] Subsequent to these two cases, this Court affirmed, in a one-sentence opinion, a lower court decision upholding the Alabama pupil assignment law which does provide standards for the assignment process. *Shuttlesworth* v. *Birmingham Board of Education*, 162 F. Supp. 372 (1958), aff'd, 358 U. S. 101 (1958). Although the statute was not challenged on the ground that the standards it established were too vague, it is worth noting that they were certainly no clearer than the phrase here challenged. They included such terms as "the effect of the admission of new pupils upon established or proposed academic programs" and "the scholastic aptitude and relative intelligence or mental energy or ability of the pupil."

Conclusion.

For the foregoing reasons, the questions presented by appellant are clearly unsubstantial and one of the questions has not been properly raised and therefore this motion to dismiss should be granted.

Respectfully submitted,

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May 11, 1960.

APPENDIX.

DIVISION AGAINST DISCRIMINATION
DEPARTMENT OF EDUCATION
STATE OF NEW JERSEY

Docket Nos. H3-12R, H3-13R.

WILLIE R. JAMES, and FRANKLIN D. TODD, Complainants, *vs.* LEVITT AND SONS, INCORPORATED, Respondent.	Stipulation

WHEREAS, an appeal is presently pending before the Supreme Court of New Jersey concerning these proceedings, Docket No. 2983, and the said Court has granted leave by Order dated November 2, 1959 to proceed before the Division Against Discrimination in these cases, concerning the allegations of racial discrimination made by the complainants, Dockets H3-12R, H3-13R.

IT IS HEREBY STIPULATED AND AGREED by and between the undersigned attorneys for Levitt and Sons, Incorporated, and the attorneys for the complainants, Willie R. James and Franklin D. Todd, and the Attorney General of New Jersey, attorney for the Division Against Discrimination, as follows:

1. Levitt and Sons, Incorporated, for the purposes of these cases, only, waives its rights to a hearing and to the stating of findings of fact and to further proceedings in the Division Against Discrimination. In the event that the

Supreme Court of New Jersey enters judgment in the pending appeal in Docket No. 2983 on a determination that the Division Against Discrimination has jurisdiction with respect to the complaints of Willie R. James and Franklin D. Todd filed against Levitt and Sons, Incorporated, the Division Against Discrimination, upon the issuance of the mandate of the Supreme Court of New Jersey, shall enter an order, without further notice, providing as follows:

"Pursuant to the stipulation of the parties hereto, it is on this day of , 1960, Ordered that:

"(a) Levitt and Sons, Incorporated, their officers, agents, employees and assigns shall cease and desist from discriminating against all persons because of race, creed, color, national origin or ancestry in passing on applications for, in the sale of and in giving occupancy of its publicly assisted housing accommodations and equipment appurtenant thereto in Levittown, New Jersey;

"(b) Levitt and Sons, Incorporated, their officers, agents, employees and assigns shall issue notice of this Order and instructions for compliance therewith to all of its officers, agents, employees and assigns concerned in processing applications for and selling its publicly assisted housing accommodations in Levittown, New Jersey, and shall post notice of this Order in a room where it can be seen by its employees whose duties include taking applications for and selling its publicly assisted housing accommodations in Levittown, New Jersey;

"(c) Levitt and Sons, Incorporated, within one month from the date of the entry of this Order, shall, upon written request from Willie R. James and

Franklin D. Todd enter into a contract to sell them each a house in Levittown, New Jersey, to be selected by them, upon the same conditions and prerequisites and subject to the same financing and terms and arrangements as were applicable to all other purchasers of its publicly assisted housing accommodations in Levittown, New Jersey at the time of the filing of the complaints herein by Willie R. James and Franklin D. Todd;

"(d) Levitt and Sons, Incorporated, 45 days after the date of entry of this Order, shall report in writing to the Division Against Discrimination the action taken by it with respect to compliance with the provisions of paragraph (c) hereof, and shall make available to the Division Against Discrimination on reasonable request and during business hours its records concerning applications for and sales of its publicly assisted housing accommodations in Levittown, New Jersey, to enable the Division Against Discrimination to supervise compliance with the provisions of this Order."

2. The County Court or the Superior Court, or both, may, upon application of the Division Against Discrimination and without notice and hearing, enter an order compelling performance of the foregoing Order.

3. The execution of this stipulation does not constitute an admission by any of the parties hereto of the validity of the factual or legal issues herein asserted by the other.

4. Execution of this Stipulation does not constitute a waiver by Levitt and Sons, Incorporated, of the right to pursue, after issuance of the mandate of the New Jersey Supreme Court, whatever judicial remedies are available to it with respect to the issues of interpretation, construc-

tion and validity of the law against discrimination raised in the pending appeal in the New Jersey Supreme Court, nor a waiver by the Division Against Discrimination or the complainants of their right to contest such action.

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Dated: November 25, 1959.